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No. 09-428

In The Supreme Court of the United States

CAROLYN L. WASHINGTON,
Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE,
Defense Logistics Agency,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is "constructive knowledge" of the 45-day limit within which a federal employee must "initiate contact with a [EEO] Counselor" to commence a complaint of discrimination under 29 C.F.R. § 1614.105(a)(1), sufficient to forestall an extension where the employee "was not notified of the time limits and was not otherwise aware of them" under subsection (a)(2) of the foregoing regulation?

CORPORATE DISCLOSURE STATEMENT

The petitioner is an individual and thus there are not corporate parents to disclose.

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REGULATIONS INVOLVED IN THE CASE

The regulation involved is 29 C.F.R. § 1614.105(a), governing the exhaustion of administrative remedies prior to commencing court action. Subsection (a) states:

> **Pre-complaint processing.**
>
> (a) Aggrieved persons who believe they have been discriminated against on the basis of race, color, religion, sex, national origin, age or handicap must consult a Counselor prior to filing a complaint in order to try to informally resolve the matter.
>
> (1) An aggrieved person must initiate contact with a Counselor within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.
>
> (2) The agency or the Commission shall extend the 45-day time limit in paragraph (a)(1) of this section when the individual shows that he or she was not notified of the time limits and was not otherwise aware of them, that he or she did not know and reasonably should not have been known that the discriminatory matter or personnel action occurred, that despite due diligence he or she was prevented by circumstances

beyond his or her control from contacting the counselor within the time limits, or for other reasons considered sufficient by the agency or the Commission.

STATEMENT OF THE CASE

The appellant, an employee of the Federal Government, filed *pro se* a civil action in the District Court alleging sexual harassment, retaliation and constructive discharge from federal employment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-16. The District Court had jurisdiction over appellant's employment discrimination claims under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1343(a)(3) (violation of civil rights), and 42 U.S.C. § 2000e-5(f)(3) (violation of Title VII).

The defendant responded with a Motion to Dismiss under Rules 12(b)(1) and 12(b)(6), asserting that appellant failed to state a claim since she did not contact an EEO counselor within the 45 days prescribed under 29 C.F.R. part 1614, and thus failed to exhaust her administrative remedies.

By Memorandum Opinion and Final Order, both entered July 11, 2008, the U.S. District Court for the Eastern District of Virginia, Richmond Division, The Honorable Richard L. Williams, Senior District Judge, granted appellee's motion. The Court also dismissed a tort claim that plaintiff filed *pro se*, which claim is not made part of this appeal.

REASONS FOR ISSUING THE WRIT

There is a division between the various circuit courts of appeal whether "constructive knowledge" of the need for a federal employee to initiate contact an EEO counselor within 45 days is sufficient, or whether that timeframe may be extended under if the aggrieved employee can establish that "she was not notified of the time limits and was not otherwise aware of them." 29 U.S.C. § 1614.105(a)(2).

The Fourth Circuit Court of Appeals has stated that constructive notice of the timeframe is sufficient to show the aggrieved employee was "notified." Jakubiac v. Perry, 101F.3d 23 (4th Cir. 1996). The District of Columbia Circuit has also following this reasoning.

The Second Circuit, however, has held that "ignorance of the law is a defense of sorts." Pauling v. Secretary of the Department of the Interior, 160 F.3d 133 (2d Cir. 1998). In that circuit, as well as the Eighth and Ninth Circuits, constructive knowledge of the law through posters advising employees of rights and procedures is inadequate to forestall extending the timeframe where the employee was not aware of it.

STATEMENT OF FACTS

The following facts are derived from the petitioner's affidavit, produced in the district court in response to the respondent's motion to dismiss under Rules 12(b)(1) and 12(b)(6):

The petitioner commenced employment with the defendant on or about April 2, 1974. She claimed to have been sexually harassed on February 16, 2006, when her second line supervisor approached be from behind while she was sitting at her cubicle and cupped her breasts with his hands. In fear and shock she immediately turned around to see who it was and ran away from the harasser. Petitioner yelled at this supervisor not to touch her again. He replied, "I am going to do it everyday."

Petitioner reported the incident to her first line supervisor as soon as he was available, which was two days later, on February 18, 2006. Petitioner was crying as she told him about the attack. The supervisor asked her what she wanted him to do about it. Petitioner replied that she wanted him to talk to the harasser about it. Petitioner's first line supervisor said that he would speak to the second line supervisor about the attack, but petitioner is not aware that he ever did. She never spoke with the first line supervisor about the incident again.

The first line supervisor never informed appellant that she needed to file a complaint with the Equal Employment Office as a requisite to filing an administrative complaint with her agency. Petitioner denied every seeing any posters or training materials advising her of the EEO or a requirement that she contact an EEO within 45 days. The training she received regarding how to respond to workplace harassment advised her to complain to her first-line supervisor, which she did.

In July of 2006, petitioner determined that she could no longer report to work due to anxiety she suffered as a result of there being no action taken against the harasser. Petitioner also felt that she was being subjected to reprisals in the form of being denied for promotion for which she applied. Only then did she learn of her need to file a complaint with EEO, which she did. On July 28, 2006, petitioner made her initial contact with the EEO office, and had an initial interview on August 2, 2006.

On September 7, 2006, the agency Equal Employment Manager dismissed petitioner's administrative complaint for failure to make timely contact with an EEO counselor within the 45 days required under 29 C.F.R. § 1614.105(a)(1). That decision was affirmed by the EEOC's Office of Federal Operations on May 17, 2007. Petitioner thereafter filed suit in the District Court.

ARGUMENT

Petitioner's sworn assertion – which was not rebutted by the agency -- is that she had no notice of the time limits for initiating contact with an EEO counselor, and not otherwise aware of the need to do so. This meets precisely the standard under 29 C.F.R. § 1614.105(a)(2) for permitting an extension of the time to initiate contact. Nonetheless, without citation to any authority, the District Court dismissed petitioner's civil action, concluding that

she had constructive knowledge of the 45-day timeframe "by at least two means;"

> the official permanent posting memorandum at DSCR notifying civilian employees of the 45-day limit of where to file a complaint, which was posted steps away from plaintiff's cubicle; and the EEO training on sexual harassment that plaintiff received on August 31, 2005, which warned plaintiff of the 45-day time limit.

(Memorandum Opinion at 4.)

The Court of Appeals for the Fourth Circuit affirmed the dismissal in a *per curiam* decision, without citing to authority that constructive notice was sufficient under the regulations.

The court, however, was presumably relying on it prior decision in Jakubiak v. Perry, 101 F.3d 23 (4th Cir. 1996). There the complaining employee was informed of the 45-day limit in a 15-page document that did not itself mention the 45-day limit, but referenced a second document that described the 45-day limit. While the court found that the "oblique reference to an outdated and unpublished document . . . [did] not provide the kind of notice contemplated by the regulation."

Jakubiak, did however, appear to endorse the constructive notice doctrine in noting that the EEO procedure was not "posted anywhere in the building where" the aggrieved employee worked. The court

described the sort of notice that is sufficient inform a complainant of the 45-day limit:

> Notice is sufficient only if it is reasonably geared to inform an employee that he must see an EEO Counselor within 45 days of the alleged discriminatory action. See, e.g. , *Johnson v. Runyon*, 47 F.3d 911, 918 (7th Cir. 1995) (noting that in order to satisfy the first exception in 29 C.F.R. § 1614(a)(2), the notice must be "`reasonably geared to inform the complainant of the time limits'" (quoting *Myles v. Schlesinger*, 436 F. Supp. 8, 17 (E.D. Pa. 1976))).

101 F.3d at 28. Thus, the District Court's dismissal of petitioner's claim in this case rested on solid circuit authority.

The Circuit Court for the District of Columbia Circuit seems also to have adopted the constructive notice standing. In Harris v. Gonzales, 475 F.3d 362 (D.C. Cir. 2007), it held:

> Nonetheless, we cannot say that no reasonable jury, viewing the evidence in the light most favorable to Harris and drawing all inferences in her favor, could conclude that she lacked constructive notice of the 45-day requirement.

This authority stands in stark contrast to the Second Circuit's decision in Pauling, where the Circuit Court noted that unlike a typical statute of limitations:

> [t]he aggrieved employee is absolved from complying with the filing period if he can show "that he . . . was not notified of the time limits and was not otherwise aware of them." 29 C.F.R. §1614(a)(2). In this context, ignorance of the law *is* a defense of sorts and government agencies are effectively placed on notice that it is in their institutional interest to clearly notify employees of this limitations period.

160 F.3d 133 (2d Cir. 1998).

The court in Pauling went on to state that the plaintiff's knowledge of the need to contact an EEO counselor generally did not afford him notice of the specific timeframe for doing so.

> Pauling's admitted awareness that he was required to bring discrimination complaints to an EEO counselor does not, in any way, indicate that he was aware that he had to do so within 45 days--or, for that matter, within the five months that the court found unreasonable. Cf. Bayer v. United States Dep't of Treasury, 956 F.2d 330,

> 333 (D.C.Cir.1992) ("[W]e are at a loss to comprehend why [plaintiff]'s knowledge that a complaint could be lodged compels the inference that Bayer knew he had only thirty days to consult an EEO counselor."). Precisely because the 45-day limitations period is unusually short, the court erred in charging him with knowledge of this time limit on the mere basis of his conceded knowledge of EEO processes generally. Cf. Johnson, 47 F.3d at 917 ("[T]he day statute of limitations is not reasonable if agencies and courts do not liberally construe the [(a)(2)] exceptions." (citation omitted)). Accordingly, Pauling's awareness of his obligation to initiate contact with an EEO counselor does not preclude the extension of time under § 1614.105(a)(2).

Falling on the same side of the issue against the effect of constructive notice is the Ninth Circuit, which recently held in Kraus v. Presidio Trust Facilities, No. 07-17177 (9th Cir. July 16, 2009). that the failure to contact an EEO "counselor" is not fatal to the claimant's complaint if she instead contacted another individual within the EEO process. The court held that the aggrieved employee "may satisfy the criterion of the EEO Counselor contact by initiating contact with any agency official logically connected with the EEO process, even if that

individual is not an EEO Counselor, and by exhibiting an intent to begin the EEO process."

Had the Ninth Circuit relied on constructive notice, it would have held that the employee's awareness to contact any official logically connected with the EEO process would have been sufficient to apprize the individual of the need to contact an EEO Counselor.

The Eighth Circuit Court of Appeals reached precisely the same result in Culpepper v. Shafer, 548 F.3d 1119 (8th Cir. 2008) (letters sent to the USDA Office of Civil Rights satisfied the regulation).

In petitioner's case, she did everything that she understood to be required of her to bring her employment discrimination case to the attention of her agency. She promptly complained to her first line supervisor. At no time was she informed of the need to proceed to the EEO office, or of the purpose of that office. She could not convey her complaint to the second line supervisor because the complaint was about him.

The only written documentation that petitioner's agency provided her regarding the 45-day limit appeared on page 45 of a handbook entitled "The Federal Employee's Guide to EEO." With all of the information that a federal employee is provided on his or job, burying such important information is an obscure handbook is simply too remote and inadequate to apprize employees of their rights, as a practical matter.

The respondent argues that the petitioner passed a poster notifying her of "Time Limits for

Processing Discrimination Complaints," several times per day walking to and from her assigned cubicle, discusses complaints of discrimination "of race, color, religion, sex, national origin, age, physical or mental disability." The petitioner's complaint, however, concerned a sexual harassment, which a common person would not equate with discrimination because of sex. Accordingly, the poster is not sufficient to apprise the plaintiff of need to initiate contact with an EEO counselor within 45 days.

CONCLUSION

For the reasons stated herein, the appellant respectfully requests that the decision of District Court be reversed.

Respectfully submitted,

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CAROLYN L. WASHINGTON,

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UNITED STATES DEPARTMENT OF DEFENSE,
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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VA

Richmond Division

CAROLYN L. WASHINGTON,

Plaintiff,

Civil Action Number 3:07CV482

v.

UNITED STATES DEPARTMENT OF DEFENSE, DEFENSE LOGISTICS AGENCY,

Defendant.

FINAL ORDER

This matter is before the Court on the defendant's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) and 12(b)(6). For the reasons stated in the accompanying Memorandum Opinion, the defendant's motion is GRANTED. The plaintiff's complaint is DISMISSED WITH PREJUDICE.

It is so ORDERED.

July 11, 2008

/s/

RICHARD L. WILLIAMS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

CAROLYN L. WASHINGTON,

Plaintiff,

Civil Action Number 3:07CV482

v.

UNITED STATES DEPARTMENT OF DEFENSE, DEFENSE LOGISITICS AGENCY,

Defendant.

MEMORANDUM OPINION

This matter is before the Court on the Motion to dismiss filed by defendant United States Department of Defense, Defense Logistics Agency ("defendant"). The plaintiff, Carolyn L. Washington ("plaintiff"), proceeding *pro se*, filed an Opposition to Defendant's Motion. Plaintiff then retained counsel and filed a new Memorandum in Opposition to Defendant's Motion to Dismiss. Defendant has replied to both of plaintiff's responses, and the matter is ripe for disposition. The parties have submitted the motion to the Court for a decision on the briefs without oral argument.

I.FACTS

Plaintiff brings this action under Title VII of the Civil Rights Act of 1964 ("Title VII"), alleging sexual harassment, retaliation, and constructive discharge in federal employment. Plaintiff also brings tort claims. On July 28, 2006, plaintiff reported to the Defense Supply Center Richmond ("DSCR") Equal Employment Opportunity ("EEO") office that she was allegedly sexually harassed by her second line supervisor on February 16, 2006, and that she was retaliated against by not being selected for a promotion she had applied for in March 2006. She also alleged during informal counseling that she was retaliated against when her supervisor allowed her team leader to yell at her. On August 7, 2006, plaintiff received a Notice of Rights and Responsibilities Under Title 29 of the Code of Federal Regulations ("CFR") Part 1614 from EEO Counselor Janice Johnson. Plaintiff also received and signed a Certification of EEO Counseling and Processing Election stating her complaints and identifying April 14, 2006 as the date the alleged discriminatory incident occurred and July 28, 2006 as the date plaintiff initially contacted the EEO office. Informal counseling failed to resolve the issues, and plaintiff was notified, by letter August 18, 2006, of her right to file a formal administrative EEO complaint, which she did on September 1, 2006, alleging sexual harassment, non-promotion and gender discrimination.

The DSCR Equal Employment Manager dismissed plaintiff's administrative complaint by letter dated September 7, 2006. He dismissed the first two claims for untimely contact with an EEO counselor pursuant to 29 C.F.R. §1614.105(a)(1), and the third claim for failure to state a claim pursuant to 29 C.F.R. §1614.107(a). Plaintiff filed a timely appeal with the Equal Employment Opportunity Commission's Office of Federal Operations (OFO) on October 30, 2006, and the OFO issued a decision on May 17, 2007, affirming the agency's dismissal of plaintiff's complaint. Plaintiff has not filed an administrative tort claim with the Office of the Staff Judge Advocate at Fort Lee, Virginia, which is the office responsible for processing tort claims involving DSCR.

II. ANALYSIS

Under Federal Rule of Civil Procedure 12(b)(6), a complaint should be dismissed for failure to state a claim upon which relief may be granted if the plaintiff fails to meet her obligation to provide the grounds of her entitlement to relief. Bell Atlantic Corp. v. Twombley, U.S. , 127 S. Ct. 1955, 1964-65 (2007). "Conclusory allegations that are unsupported by factual assertions are not sufficient to withstand" a motion to dismiss for failure to state a claim. Friday v. Commonwealth of Virginia, No. 3:00cv867, 2001 U.S. Dist. LEXIS 9896, at *3 (E.D. Va. July 12, 2001), aff'd, 2002 U.S. App.

LEXIS 8328 (4th Cir. 2002). In considering a Rule 12(b)(6) motion, the court can consider documents outside o the pleadings, "so long as [they] are integral to and explicity relied upon in the complaint," such as plaintiff's informal and formal discrimination complaints. Lorenzo v. Rumsfeld, 456 F.Supp.2d 731,734 (E.D. Va. 2006), aff'd sub nom. Lorenzo v. Gates, No. 06-2332, 225 Fed. Appx. 165 (4th Cir. April 30, 2007) (unpublished).

The Court finds that plaintiff has failed to show that her administrative complaint was timely filed, that she fails to state a cognizable claim under Title VII, and that she fails to show that the Court has jurisdiction over her tort claims. First, plaintiff failed to timely exhaust her administrative remedies before filing her judicial complaint. A Person who asserts a Title VII discrimination claim in U.S. district court must pursue and exhaust her administrative remedies prior to filing the action. If a plaintiff fails to do so, her complaint will be dismissed. Brown v. Gen. Servs. Admin., 425 U.S. 820, 832 (1976). Federal sector employees like plaintiff must contact an EEO counselor "within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action." 29 C.F.R. §1614, 105(a). Plaintiff does not dispute that she failed to contact the EEO Office until July 28, 2006, more that five months after the alleged sexual harassment and four months after she did not

receive a promotion. She provides no excuse for her failure to contact an EEO counselor within 45 days of the alleged retaliatory personnel action to promote someone else in March 2006.

Plaintiff argues that the 45-day limit should be extended, pursuant to 29 C.F.R. §1614.105(a)(2), because she was not notified of the time limits and was not otherwise aware of them. The Court is not persuaded by plaintiff's argument because plaintiff was notified of the time limit by at least two means: the official permanent posting memorandum at DSCR notifying civilian employees of the 45-day time limit and of where to file a complaint, which was posted steps away from plaintiff's cubicle; and the EEO training on sexual harassment that plaintiff received on August 31, 2005, which warned plaintiff of the 45-day time limit. Plaintiff is not entitled to equitable relief from her failure to timely comply with the time limit because she has not made a showing of affirmative misconduct on the part of the government. See Zografov v. V.A. Medial Center, 779 F.2d 967, 969-70 (4th Cir. 1985). There was no misconduct because the DSCR regularly and properly informed its employees of the 45-day time limit.

Plaintiff also argues that her failure to timely exhaust her administrative remedy was justified because when she complained to her supervisor about the alleged sexual harassment, he failed to

notify her of the need to file a complaint with the EEO Office within 45 days. Even taking this allegation as true, a discussion with a supervisor concerning a potential sexual harassment complaint is not the equivalent of indicating an intent to initiate an administrative complain of discrimination with an EEO office, nor does it rise to the level of affirmative misconduct on the part of the government. See Nealon v. Stone, 958 F.2d 584, 589-90 (4th Cir. 1992).

In sum, the Court finds that plaintiff had both actual and constructive knowledge of the time limits and the appropriate manner in which to make a complaint of discrimination. However, she failed to file her complaints with the EEO Office within the 45-day time limit, so her complaints of sexual harassment and non-promotion are dismissed.

Next, the Court finds that plaintiff has failed to state a cognizable claim of gender discrimination or reprisal regarding the incident in which she alleges a work leader yelled at her. Plaintiff complains that her Division Chief "made [her] wait three (3) days to discuss the Work Leader incident, "and that her first line supervisor "failed to mention counseling of any type...the Employee Assistance Program, or EEO rights..." The Fourth Circuit has mandated that in a discrimination case, the Plaintiff must show an "ultimate employment" action that affects "hiring, granting leave, discharging,

promoting, and compensating." Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981). Plaintiff's complaints about the incident do not demonstrate the type of ultimate employment action necessary for a *prima facie* case of discrimination. See Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997). Accordingly, plaintiff's claim of gender discrimination and reprisal related to the work leader incident is dismissed.

Lastly, the Court finds that it does not have subject matter jurisdiction over plaintiff's tort claims. Although plaintiff does not press her tort claims in her counseled Memorandum in Opposition to Defendant's Motion to Dismiss, she complained in her first Opposition to Defendant's Motion, filed *pro se*, that "the Defendant did not ensure my safety or well-being." The Court dismisses this claim because Title VII is her exclusive remedy. Title VII provides the exclusive remedy for claims of discrimination in federal employment. 42 U.S.C. §2000e-16; Brown v. Gen. Servs. Admin., 425 U.S. 820, 835 (1976). Since plaintiff's tort claim is wholly derivative of the alleged sexual harassment conduct giving rise to her Title VII claims, she must look to Title VII as her exclusive remedy. Additionally, in regard to all of plaintiff's tort claims, she has failed to show that she has exhausted the administrative procedure required under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680. The Fourth Circuit has held that "the requirement of filing an

administrative claim is jurisdictional and may not be waived." Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986). The Court is therefore deprived of subject matter jurisdiction over plaintiff's alleged tort claims. See Eveland v. Dir. Of the C.I.A., 843 F.2d 46, 50 (1st. Cir. 1988). Pursuant to Federal Rule of Civil Procedure 12 (b)(1), plaintiff's tort claims are dismissed.

III. CONCLUSION .

In summary, defendant's motion to dismiss is GRANTED, and plaintiff's complaint is DISMISSED WITH PREJUDICE.

An appropriate order shall issue.

July 11, 2008

/s/

RICHARD L. WILLIAMS
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1880
(3:07-cv-00482-RLW)

CAROLYN L. WASHINGTON,
Plaintiff – Appellant

v.

UNITED STATES DEPARTMENT OF DEFENSE,
Defense Logistcs Agency,
Defendant – Appellee

J U D G M E N T

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-1880

CAROLYN L. WASHINGTON,
Plaintiff – Appellant,

v.

UNITED STATES DEPARTMENT OF DEFENSE,
Defense Logistics Agency,
Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Richard L. Williams, Senior District Judge. (3:07-cv-00482-RLW)

Submitted: June 22, 2009
Decided: July 7, 2009

Before WILKINSON and TRAXLER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Scott G. Crowley, Sr., CROWLEY & CROWLEY, Richmond, Virginia, for Appellant. Dana J. Boente, Acting United States Attorney, Debra J. Prillaman, Assistant United States Attorney, Daniel L. Freye, OFFICE OF COUNSEL, DEFENSE SUPPLY CENTER RICHMOND, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Carolyn L. Washington appeals the district court's order dismissing this action filed pursuant to Title VII of the Civil Rights Act of 1964, as amended. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Washington v. United States Dep't of Defense, No. 3:07-cv-00482-RLW (E.D. Va. July 11, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED